

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

RECEIVED

JAN 28 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

 Reexamination of the Comparative)
 Standards for Noncommercial)
 Educational Applicants)

MM Docket No. 95-31

To: The Commission

COMMENTS OF AUGUSTA RADIO FELLOWSHIP INSTITUTE, INC.

Augusta Radio Fellowship Institute, Inc. (hereafter "ARFI"), by its counsel and pursuant to the Commission's FURTHER NOTICE OF PROPOSED RULE MAKING (hereafter the "Notice"), FCC 98-269¹, in the above captioned proceeding, hereby respectfully submits these comments on the proposed standards for deciding among competing applicants for noncommercial, educational ("NCE") broadcast stations.² In summary, ARFI does not believe that the traditional comparative hearing process should be retained. ARFI also believes that a lottery or random selection process does not serve the public interest requirements of the Communications Act of 1934, as amended. ARFI favors a point system utilizing criteria that do not give NCE applicants any incentive to engage in comparative "gamesmanship" in connection with their NCE

¹ Released October 21, 1998.

² The deadline for filing comments was extended to January 28, 1999, pursuant to the Commission's Order in MM Docket No. 95-31, released on December 3, 1998, DA 98-2489.

 No. of Copies rec'd 074
 List ABCDE

applications. Moreover, ARFI submits that the Commission lacks the statutory authority to prohibit NCE applicants from applying for non-reserved FM allotments and believes that such an exclusion is contrary to the Commission's policy of increasing the diversity of broadcast voices. ARFI believes there are other legally sound ways of dealing with competing commercial and NCE applications for such frequencies.

I. BACKGROUND.

1. ARFI is a non-profit, private educational organization which is recognized by the United States Department of the Treasury as tax exempt under Section 501(c)(3) of the Internal Revenue Code, and which has been found by the Commission to be legally qualified to operate broadcast stations utilizing that portion of the FM band reserved for educational broadcasting. ARFI is the Commission licensee of noncommercial educational broadcast stations operating on both reserved NCE-FM frequencies and non-reserved FM channels. ARFI operates NCE licensed FM translators on non-reserved and reserved FM channels. ARFI is a competing applicant for noncommercial, educational FM stations proposing the use of frequencies in the reserved portion of the FM band and is a noncommercial, educational applicant among a group of competing applications for the use of a non-reserved FM channel at Forest Acres, South Carolina. Thus, ARFI is well aware of the complications inherent in situations involving competing applications for reserved band, educational FM channels, and involving non-reserved FM channels with both commercial and educational applicants.

II. DISCUSSION

A. PROCEDURES ON RESERVED NCE SPECTRUM.

Comparative Hearings.

2. ARFI agrees that there is no merit in continuing the use of the traditional comparative hearing process in deciding among competing applicants for NCE frequencies. The comparative hearing process is time consuming and expensive for the applicants. It wastes the limited resources of the Commission and does not guarantee that the most qualified applicant will prevail.

Lotteries.

3. The Congress affirmed the authority of the Commission to use lotteries as a method for resolving competing applications for NCE spectrum in the Balanced Budget Act of 1997. However, the Act does not require the use of random selection methods by the Commission in determining among competing applicants for NCE facilities. While lotteries allow for a quick decision, any lottery is a method of random selection based solely on chance, not merit. Random chance does not allow the Commission to decide among competing NCE applicants based on the relative strengths of their competing applications, as is required by the overall public interest standards of Sections 309(a) and 307(b) of the Act. Moreover, the Commission has stated in the past in connection with other lottery proposals that any potential gains in efficiency realized by the use of

random selection are significantly outweighed by the high probability that there will be a corresponding decrease in the quality of selectees and service to the public.³

4. The Notice attempts to overcome these problems by suggesting a method of increasing the likelihood of selection through preferences based on certain “meritorious” criteria that can be claimed by applicants. While these enhancements may make a lottery somewhat less arbitrary, in fact any process involving a determination based on any form of random selection will always be arbitrary and subject to the selection of less qualified NCE applicants. ARFI does not believe that the public interest mandate can be adequately served in a decision-making process that is as heavily weighted by randomness as it is by applicant merit.

A Merit Point System.

5. The point system proposal for comparative decision-making is preferable. A point system allows for a comparative analysis with the “winner” being the applicant who proposes the most meritorious use of the NCE spectrum. Thus, a point system will allow for the selection of the best-qualified applicant, not subject to “luck. However, the Commission must be careful in determining the various criteria to which it may accord merit points in connection with such a system, or this process becomes as arbitrary as a lottery.

6. The Commission must recognize that certain characteristics of an applicant group may seem meritorious and deserving of points or “credits”, but only to the extent

³ *Random Selection of Broadcast Applicants*, 67 RR 2d 644 (1990).

that those characteristics that are not subject to change as soon as a decision has been made on the winning applicant. For example, the Commission's Notice proposes a "minority control credit" for applicants controlled both de jure and de facto by minorities, and a "local educational presence credit" for applicants whose boards are made up of local citizens in the proposed community of license. ARFI's experience has been that membership on the boards of non-profit corporations and organizations is subject to constant changes as volunteer members leave the board and/or are replaced by others. There is no guarantee that a minority or locally controlled non-profit organization seeking a NCE license will continue to be a minority or locally controlled entity after the license is approved by the Commission. This point has been proven in the context of the Commission's well intentioned policy of affording dispositive minority and female comparative credits in commercial broadcast comparative hearings. Many minority and female "controlled" applicants lost these characteristics once the comparative credits were given to them and their applications were approved. Moreover, under the Tax Reform Act provisions the Commission is not required to include minority or local participation as enhancing factors in a point system.

7. The proposal in the Notice for a "local diversity" credit based on an applicant's proposed station not having contour overlap with the principal community contour of any commonly controlled broadcast station is also illusory. Any NCE application can be drawn up to avoid overlap with an existing station in order to qualify for such a point. The problems is that after a construction permit is granted, any

NCE-FM application can then be modified to specify facilities with service contours that will overlap

8. ARFI submits that comparative credits based on easily modified criteria are an incentive for applicants to submit NCE applications intended solely to gain an advantage from such standards for comparative purposes. The Commission's experience in commercial broadcast hearings has also shown that it lacks the resources to police post-grant applicants and to fully ensure that they live up to their previous comparative promises. Such disincentives for applicants to act truthfully and in full candor with the Commission in the context of NCE applications thereby should be avoided. ARFI would suggest the following comparative enhancements for a comparative NCE application point system adjudication process.

PAST NCE BROADCAST RECORD.

9. ARFI submits that one point should be given to NCE applicants who can show a record of NCE broadcast station operation and service to the public for a period of at least ten (10) years prior to the filing date of its application. Such a credit should only be accorded to NCE licensees who can also show that their ten year or greater term of NCE broadcast station operation is untainted by fines, forfeitures or admonitions from the Commission in response to violations of the NCE broadcast rules.

10. The Commission has recognized that the past broadcasting record of an applicant is the "most reliable gauge" of the service that can be expected in the future.⁴ This finding has been upheld as a valid criterion by the federal courts.⁵ The growth of interest in NCE station operation by non-profit, educational entities has resulted increasingly in violations of the Commission's rules limiting the programming of such stations to a "non-commercial" basis. See, Letter to Agape Broadcasting Foundation, KNON-FM (DA 98-825), released May 1, 1998 and the cases cited therein. ARFI submits that any applicant who can demonstrate a substantial and untarnished record of NCE broadcast station operation should be accorded one merit point.

COMPARATIVE COVERAGE.

11. ARFI agrees that NCE applicants who will more broadly serve the public should receive one merit point. This point should be given among competing applications to an applicant whose proposed facility will provide service within its 60 dBu contour that is at least 10% greater than the service area of each of the other applicants.

B. EDUCATIONAL INSTITUTIONS AND STATE NETWORKS.

12. Section 73.503 of the Commission's rules does not require that a NCE applicant be an accredited state, regional, or national educational organization.⁶ Nor does it require that such applicants be part of a "state-wide plan" for NCE broadcasting.

⁴ See, *Wabash Valley Broadcasting Corporation*, 1 RR 2d 573 (1963) and *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 18 RR 2d 1901 (1970).

⁵ *Central Florida Enterprises, Inc. v. FCC*, 683 F. 2d 503 (1982).

⁶ *C.f. Lower Cape Communications, Inc.*, 47 RR 2d 1577 (1980).

In the past, the Commission has not given a comparative benefit to a NCE applicant based on its status as an educational institution, accredited or otherwise, or as a member of a state organized network or plan. There is no statutory basis for according such a credit under any provisions of the Act. The Commission's Notice does not indicate that the Congress has mandated, or authorized, that such a credit to be given in the comparative consideration of NCE applications. ARFI submits that there is no basis for the Commission allowing educational institutions or applicants who claim to be part of a state or municipal educational broadcasting "plan" to receive a merit point in connection with a point system in deciding among competing NCE applications.

C. NONCOMMERCIAL EDUCATIONAL APPLICANTS ON "COMMERCIAL"
FREQUENCIES.

(1) Preference Based on Availability of Alternative Channels.

13. As noted previously, neither the Act nor the Commission's rules reserve any portion of the broadcast spectrum exclusively for the use of for-profit, commercial licensees. Accordingly, the Commission lacks statutory authority to preclude NCE applicants from submitting applications to utilize non-reserved FM channels or AM frequencies. Presumably Congress would have implemented such a restriction in connection with the Tax Reform Act of 1997 had the competitive bidding limitation to commercial broadcast applications adopted therein been intended to prompt the Commission to label NCE applications "ineligible" to apply for non-reserved channels. It did not do so. The intent of Congress is therefore clear. The restriction on competitive bidding authority to situations involving only commercial broadcast

applicants, without a corresponding restriction on NCE applications applying for non-reserved channels, was not intended to prompt the Commission to change its current policy of allowing both commercial and NCE applicants to apply for non-reserved channels. Moreover, it is entirely inconsistent with the Commission's long-standing policy, as enunciated in the Notice, of encouraging the "inclusion" of diverse groups, including minorities, in broadcasting to adopt a policy of "exclusion" when it comes to non-profit, noncommercial applicants desiring to use non-reserved band FM channels.

14. In cases in which there are both commercial and NCE applicants for non-reserved channels, ARFI submits that the NCE applicants should be given a preference if it can be shown that there is a greater need for service from NCE stations than from additional commercial stations. Such a determination can be made by analyzing the number of commercially licensed AM and FM stations serving the proposed community of license with a 60 d/b/u contour versus the number of NCE stations. Where there are significantly more commercial stations than NCE stations serving the community, the commercial applications will be dismissed, and any competing NCE applications processed pursuant to the NCE procedures adopted herein. On the other hand, if it can be shown that there are reserved-band, NCE frequencies in excess of commercial stations, the NCE applications will be dismissed in favor of an auction among the commercial applicants. This procedure will allow for either commercial or NCE use of a non-reserved channel depending on whether there is a greater need for one type of service over the other.

D. SECTION 307(b) CONSIDERATIONS.

15. While reexamining the comparative standards for NCE applications, the Commission must not lose sight of the requirements of Section 307(b) of the Act. As the Commission has consistently found in the past, where applicants for conflicting NCE channels propose to serve different communities and areas, that it must determine which of the proposals would best provide a fair, efficient, and equitable distribution of radio service. If the Commission cannot make a determination under Section 307(b) favoring one community over another, comparative consideration is to be given to all the applicants. Noncommercial, educational radio stations are to be considered in a Section 307(b) analysis, and conflicting applications for NCE-FM stations involving different communities of license require, before any comparative analysis based on individual merit or "bonus points", a determination whether one applicant should be granted on the basis of a clear Section 307(b) preference. The Commission's Notice infers that this requirement can be reduced to the level of a lottery or point system enhancement. See, Notice at page 12, paragraph 21(B). However, where multiple NCE-FM applicants submit conflicting applications proposing to serve different communities of license, the Commission must first make a determination under Section 307(b) of the Act whether one application should be approved based on the greater need for the use of the NCE-FM channel in that community.

WHEREFORE, Augusta Radio Fellowship Institute, Inc. respectfully submits these comments to assist the Commission in formulating a legal and equitable basis for choosing among competing NCE applications.

Respectfully submitted,

August Radio Fellowship Institute, Inc.

By: 

Jeffrey D. Southmayd

Its Attorney

Southmayd & Miller
1220 Nineteenth Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 331-4100

Date: January 28, 1999